No. SC95194

In the Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

LUIS E. ZETINA-TORRES,

Appellant.

Appeal from the Saline County Circuit Court
Fifteenth Judicial Circuit
The Honorable Dennis A. Rolf, Judge

SUBSTITUTE RESPONDENT'S BRIEF

CHRIS KOSTER
Attorney General

DORA A. FICHTER
Assistant Attorney General
Missouri Bar No. 51756

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
Dora.Fichter@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF FACTS

Appellant, Luis Enrique Zetina-Torres, was charged in the Circuit Court of Saline County with drug trafficking in the first degree (L.F. 5). After a jury trial, appellant was convicted of drug trafficking in the second degree. *State v. Zetina-Torres*, 400 S.W.3d 343 (Mo. App., W.D. 2013). On March 5, 2013, the Court of Appeals, Western District, reversed appellant's conviction and remanded for a new trial. *Id.* On February 13 and 14, 2014, appellant was retried (Tr. 30-329). Appellant challenges the sufficiency of the evidence. Viewed in the light most favorable to the verdict, the following evidence was adduced at trial:

On June 16, 2010, Trooper Robert McGinnis with the Missouri State Highway Patrol participated in a ruse drug checkpoint on Interstate 70 in Saline County (Tr. 152-153). As a part of the operation, law enforcement officers placed signs on the highway warning the motorists that there was a drug checkpoint ahead (Tr. 153). The signs were placed near an exit that had no services for the public and no reason for motorists to exit except to avoid the checkpoint (Tr. 153).

A black Nissan truck exited the interstate onto Highway EE (Tr. 156). Trooper McGinnis followed t to the city limits of Marshall where he stopped it for speeding (Tr. 157-158). Appellant was the driver (Tr. 162). The passenger was Roberto Maldonado-Echeverria (Tr. 164). The truck was registered to

Benitez Mardonio Cardova, 7100 Longview Rd., Kansas City (Tr. 199). Appellant apologized for speeding and provided a driver's license from Sonoma, Mexico (Tr. 162). Appellant said that he borrowed the truck from a friend and provided an insurance card for the truck that was issued to Benitez Mardonio Cardova and Hugo Rivera (Tr. 163, 210). The passenger provided a non-driver's license (Tr. 164).

Trooper McGinnis noticed a strong odor of air freshener, which was commonly used as a masking agent (Tr. 165-166). The passenger kept yawning, which the trooper was trained to recognize as a possible sign of nervousness (Tr. 164-165). Appellant and the passenger avoided eye contact (Tr. 165).

Trooper McGinnis asked appellant to come to the trooper's car and have a seat while the trooper completed a computer check (Tr. 166). In the car, Trooper McGinnis asked appellant where he was going, and appellant replied that he was going to a nearby town to pick up a pickup truck from a friend and to take it to Kansas City to work on its engine (Tr. 167). Appellant mumbled when asked what city he was going to, and then he said Marshall (Tr. 167). Appellant did not identify the friend he was allegedly going to visit (Tr. 167). Appellant said that the passenger was not a mechanic and that appellant knew him for about one year (Tr. 168). Both appellant and the

passenger were not dressed like they were going to do mechanical work (Tr. 169).

Trooper McGinnis learned that the passenger's driver's license was suspended, and he told appellant that the passenger could not drive a vehicle back to Kansas City (Tr. 170). Appellant said that he knew that, and that the passenger came for the ride (Tr. 170). Appellant continued to avoid eye contact and hesitated when answering questions (Tr. 171). Trooper McGinnis asked appellant whether there were drugs or illegal weapons in the truck, and appellant said, "[N]o, you can check." (Tr. 172). To clarify, Trooper McGinnis asked appellant whether he could search the truck, and appellant said, "[Y]es" (Tr. 172).

Trooper McGinnis walked to the passenger and asked him where he and appellant were going (Tr. 173). The passenger said that they were going to Sedalia to visit appellant's friends (Tr. 173). The passenger said that he knew appellant for two or three months (Tr. 175). Trooper McGinnis asked the passenger to exit the truck, and he then searched it (Tr. 176).

Trooper McGinnis noticed that the tail gate was locked and that the bed liner in the truck was sticking out (Tr. 177). Trooper McGinnis lifted the liner and found a plastic bag containing 438.74 grams of methamphetamine (Tr. 178-179, 237, 295). The methamphetamine was wet, indicating that it was recently made (Tr. 178). A typical quantity for personal use was 1 gram

or less, and 1 gram usually sold for $100 (Tr. 187-188). Interstate 70 was a drug corridor, and Kansas City was a distribution center for drugs (Tr. 184-185).

Inside the truck, Trooper McGinnis saw a GPS device displaying the address 7100 Longview Rd. Kansas City and a Sedalia address (Tr. 180). The device was placed so that the passenger had a superior opportunity to view it (Tr. 180). In appellant's wallet, the trooper found a bank card with the name of Mardonio Cordova Benitez, and there were several documents in the passenger door pocket with the same name (Tr. 215, 217-218). Fingerprints taken during the booking of Benitez in 2010 matched appellant's fingerprints (Tr. 256-257, 284-288). A text message on appellant's cellular phone had the address 7100 Longview Rd. Kansas City (Tr. 214). Also in appellant's wallet, the trooper found a business card for the passenger with the passenger's court date on the back (Tr. 223). Appellant was using a single key, which was a common practice in using a vehicle for drug transactions (Tr. 205).

At the close of all the evidence, the jury found appellant guilty of drug trafficking in the second degree (Tr. 371). The court sentenced appellant to twenty years in the Missouri Department of Corrections (L.F. 39-41). On June 9, 2015, the Court of Appeals reversed and vacated appellant's conviction for drug trafficking in the second degree. *State v. Zetina-Torres*,

WD77424 (Mo. App., W.D. June 9, 2015). On September 22, 2015, this Court granted Respondent's application for transfer. This appeal followed.

ARGUMENT

I.

The evidence was sufficient to support appellant's conviction for drug trafficking in the second degree.

In his first point, appellant claims that the evidence was insufficient to support his conviction for drug trafficking in the second degree (App. Br. 18-43).

A. Sufficient evidence supported appellant's conviction for drug trafficking in the second degree

"Appellate review of a claim of insufficient evidence supporting a criminal conviction is limited to a determination of whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt." *State v. Whitby*, 365 S.W.3d 609, 614 (Mo. App., E.D. 2012). The Court must "give great deference to the trier of fact, accepting as true all evidence and reasonable inferences favorable to the State, and disregarding all evidence and inferences to the contrary." *Whitby*, 365 S.W.3d at 614. On appellate review, the Court must give great deference to the trier of fact, and does not sit as a super juror possessing the power to veto the result below. *State v. Morton*, 229 S.W.3d 626, 629 (Mo. App. S.D. 2007). The Court does not reweigh the evidence, resolve evidentiary conflicts,

or decide the credibility of witnesses. *State v. Edwards*, 365 S.W.3d 240, 250 (Mo. App. W.D. 2012).

A person commits the crime of trafficking drugs in the second degree if he possesses or has under his control, purchases or attempts to purchase, or brings into this state more than thirty grams of any material, compound, mixture or preparation which contains any quantity of methamphetamine. Section 195.223.9, RSMo. To support a conviction for trafficking in the second degree, the state must prove beyond a reasonable doubt that the defendant had conscious and intentional possession of the substance, either actual or constructive, and that the defendant was aware of the presence and nature of the substance. *State v. Poindexter*, 941 S.W.2d 533, 536 (Mo. App. W.D. 1997). To show constructive possession, the state must show at least that the defendant had access to, and control over, the place where the substance was. *Id*. The presence of a large amount of a substance tends to prove that the defendant was conscious of his possession of the drugs. *State v. LaFlamme*, 869 S.W.2d 183, 186 (Mo. App. W.D. 1993).

A person "possesses" a substance when he or she has "knowledge of the presence and nature of [the] substance." § 195.010(34), RSMo Cum. Supp. 2007. Possession can be "actual or constructive." *Id*. "A person has actual possession if he has the substance on his person or within easy reach and convenient control." *Id*. "A person who, although not in actual possession, has

the power and the intention at a given time to exercise dominion or control over the substance either directly or through another person or person is in constructive possession of it." *Id*. "Possession may also be sole or joint." *Id*. "If one person alone has possession of a substance possession is sole." *Id*. "If two or more persons share possession of a substance, possession is joint." *Id*.

"Proof of a defendant's knowledge of the presence and character of a substance is normally supplied by circumstantial evidence of the acts and conduct of the accused from which it can be fairly inferred he or she knew of the existence of the contraband." *State v. Woods*, 284 S.W.3d 630, 639 (Mo. App. W.D. 2012). "In cases involving joint control of an automobile, a defendant is deemed to have both knowledge and control of items discovered within the automobile, and, therefore, possession in the legal sense, where there is additional evidence connecting him with the items." *Id*. at 640. "This additional evidence must demonstrate sufficient incriminating circumstances to permit the inference of a defendant's knowledge and control over the controlled substance." *Id*.

Additional incriminating circumstances that support an inference of knowledge and control include: 1) a large quantity of drugs in the vehicle; 2) drugs having a large monetary value; 3) easy accessibility or routine access to the drugs; 4) odor of drugs in the vehicle; 5) the presence of the defendant's personal belongings in close proximity to the drugs; 6) making false

statements in an attempt to deceive the police; 7) the defendant's nervousness during the search; 8) the defendant's flight from law enforcement; 9) presence of drugs in plain view; and 10) other conduct and statements made by the accused. *Id*. The Court considers the totality of the circumstances in determining whether the evidence of additional incriminating circumstances sufficiently supported an inference of knowledge and control. *State v. Morgan*, 366 S.W.3d 565, 577 (Mo. App. E.D. 2012).

Under the totality of the circumstances, the evidence supported the jury's finding of guilt. Appellant and his companion were traveling on a recognized drug corridor (Tr. 185-186). Appellant was driving, and he exited the interstate in a non-service area after passing signs warning that there was a drug checkpoint ahead (Tr. 152-153). Taking a highway exit without services under circumstances suggesting no innocent purpose for doing so supports a finding of reasonable suspicion. See, e.g., *State v. Mack*, 66 S.W.3d 706, 709 (Mo. banc 2002) (there was individualized reasonable suspicion to conduct an investigatory stop when a car abruptly exited a highway at an exit without services at night in an apparent attempt to avoid "ruse" drug checkpoint).

Appellant and his accomplice avoided eye contact with Trooper McGinnis and told multiple lies in an attempt to conceal their destination, the purpose of their trip, and their association. Appellant claimed that he was

going to Marshall to pick up a truck with a faulty engine and take it back to Kansas City to repair it (Tr. 167). Appellant's companion claimed that both men were going to Sedalia, and there was a Sedalia address entered on the GPS system (Tr. 173). Neither appellant nor his companion was dressed appropriately for repairing a truck, and appellant's companion had no valid driver's license to drive one of the vehicles back to Kansas City (Tr. 169). Appellant claimed that he knew his companion for about one year, while his companion claimed that he knew appellant for two or three months (Tr. 175). "Guilt may be inferred when an accused attempts to deceive the police, as in making a false exculpatory statement." *Jones v. State*, 197 S.W.3d 227, 232-33 (Mo. App. W.D. 2006) (quoting *State v. Buchli*, 152 S.W.3d 289, 297 (Mo. App. W.D. 2004)); see also *State v. Morgan*, 366 S.W.3d 565, 577 (Mo. App. E.D. 2012) (the jury could infer consciousness of guilt from several circumstances, including the defendant's false statement to the officers about whether he smelled of ether).

Appellant claimed that the truck belonged to Mardonio Cordova Benitez, but fingerprints taken during the booking of Benitez in 2010 matched appellant's fingerprints (Tr. 256-257, 284-288). The jury also saw a photograph of Benitez, and it was reasonable to conclude that appellant was in fact Benitez, the owner of the truck he was driving (Tr. 261). A text message on appellant's cellular phone had the address 7100 Longview Rd.

Kansas City, which was Benitez's address (Tr. 214). Appellant was using a single key, which was a common practice in using a vehicle for drug transactions (Tr. 205). Appellant's ownership of the truck and his possession of the single truck key were incriminating facts connecting appellant to the contraband. *See State v. Berry*, 54 S.W.3d 668, 677 (Mo. App. E.D. 2001) (as the owner of the vehicle, the defendant had superior access to the trunk); *State v. Chong-Aguirre*, 413 S.W.3d 378, 386 (Mo. App. S.D. 2013) (ownership of the truck containing cocaine created a clear implication that the defendant controlled the drugs).

Moreover, finding a large quantity of drugs in the vehicle is additional evidence of possession. *State v. Stover*, 388 S.W.3d 138, 147 (Mo. banc 2012). Here, Trooper McGinnis found 438 grams of methamphetamine (Tr.178-179, 237, 295). The usual amount for personal use was 1 gram or less (Tr. 187-188). The methamphetamine was worth approximately $43,000 (Tr. 188). Finding drugs with a high monetary value is additional evidence of possession. *Id.*

In a similar case, *State v. Woods*, 284 S.W.3d 630, law enforcement officers set up a ruse checkpoint on Interstate 70, intending for drug couriers to exit the interstate to avoid the checkpoint. *Id.* at 633. A vehicle in which the defendant was a passenger exited the interstate, then turned and entered the interstate in the opposite direction from which it came. *Id.* A law

enforcement officer followed the car and tried to stop it for a traffic violation. *Id.* The occupants tried to evade the police by exiting the car and walking fast to a gas station. *Id.* The defendant and the driver stopped when ordered by the police, and a search of the driver revealed a large amount of money. *Id.* When asked for permission to search the vehicle, the driver said that the defendant rented the car. *Id.* The defendant refused to agree to a search of the vehicle. *Id.* A canine sniff and subsequent search revealed 9,000 grams of cocaine in the trunk of the car, and the police found a large bundle of cash on the defendant's person. *Id.*

The Court of Appeals held that there was sufficient evidence to support the defendant's conviction for drug trafficking in the second degree. The Court observed that the defendant traveled along a known drug corridor in a car he had rented, that he and the driver attempted to evade the police, that he was nervous, and that he had two cellular phones and a large amount of money. *Id.* at 640. *See also State v. Zetina-Torres*, 400 S.W.3d at 358 (the evidence that appellant exited the interstate after signs indicated a drug checkpoint ahead, that he owned the truck and lied about the ownership, that he and the passenger gave conflicting information about each other, that a large amount of drugs were recovered where one could see from the outside of

truck that the bed liner was amiss, and that there was a the strong odor of a masking agent was sufficient to support appellant's conviction).[1]

Similarly, in the present case, appellant was traveling in a drug corridor, exited the interstate to avoid a drug check point, he was owner of the truck in which large quantity drugs were hidden, and he and the passenger showed nervousness and gave inconsistent statements showing their consciousness of guilt. The evidence was sufficient to show that appellant possessed the drugs hidden in the bed of his truck.

B. Sufficiency of the evidence is a question of law that arises before the case is submitted to the jury

Appellant argues that he could not be found guilty for possessing the drugs alone because the jury was instructed on the theory of accomplice liability (App. Br. 24-26, 40-41). Appellant contends that the state had to prove the elements of the crime as stated in the jury instruction, which required a finding that appellant acted together with or aided the co-defendant in the commission of the crime (L.F. 24-26).

---

[1] In the first appeal, the Court found sufficient evidence based on a similar record but it remanded the case for a new trial based on discovery violation.

But this argument is an attack on the verdict director, not on the sufficiency of the evidence. "The question of sufficiency arises before the case is put to the jury and is really an issue of whether the case should have been submitted to the jury." *State v. Beggs*, 186 S.W.3d 306, 312 (Mo. banc 2005), see also *State v. O'Brien*, 857 S.W.2d 212, 215 (Mo. banc 1993) (sufficiency of the evidence "is a question of law to be determined, in the first instance, by the trial court on a proper motion by the defendant and again on appeal"). "The elements of an offense are derived from the statute establishing the offense or, when relevant, common law definitions," not by the jury instructions. *State v. Myles*, ED101486, slip opinion p. 14 (Mo. App. E.D. September 8, 2015), *State v. Hines*, 377 S.W.3d 648, 655 (Mo. App. S.D. 2012). "When properly raised by the defendant, the question of sufficiency arises before the case is put to the jury; the challenge is to the 'submissibility' of the case." *State v. O'Brien*, 857 S.W.2d at 215. *Id.* "Therefore, any guilty verdict subsequently rendered by the jury is wholly irrelevant to the question of whether the case was sufficient to go to the jury at all." *Id.*

Appellant was charged with drug trafficking in the second degree for "acting either alone or knowingly in concert with another person or persons" (L.F. 5-6). Thus, the Court must determine whether or not the evidence showed that appellant's conduct, alone or acting in concert with others, satisfied the elements of drug trafficking in the second degree. At the time

the trial court overruled appellant's motion for judgment of acquittal, there were no instructions submitted, and the propriety of the jury instruction was not a basis for determining the sufficiency of the evidence.

In a similar case, *State v. Young*, 369 S.W.3d 52, 54 (Mo. App. E.D. 2012), the defendant challenged the sufficiency of the evidence to support his conviction for assault in the first degree and armed criminal action based on accomplice liability. The defendant argued that the evidence did not show that he "acted together with or aided" the co-defendant in committing the offense, as provided for in the jury instruction. *Id.* The Court of Appeals stated:

> The defendant challenges the denial of his motion for judgment of acquittal at the close of all the evidence, which occurred before the trial court instructed the jury. Thus, we will evaluate whether the State presented sufficient evidence to submit to the jury the cases against the defendant for first-degree assault and armed criminal action without regard to the form of the verdict-director. We will address the alleged instructional error in our consideration of the defendant's second point.

Id. at 54 n.3.

The court then determined that the evidence was sufficient to support the defendant's conviction as an accomplice. The Court further found that the

jury instruction containing the language "acted together with or aided" was erroneous, but that it did not result in prejudice. *Id.* at 56-57

Likewise, in S*tate v. Jones*, 296 S.W.3d 506, 509 (Mo. App., E.D. 2009), the defendant claimed that the evidence was insufficient to support his conviction for robbery and armed criminal action on the theory of accomplice liability because the jury instructions provided that the defendant acted together with the co-defendant in committing the crime. In addressing this claim, the Court of Appeals stated the following:

> [W]e note that Defendant is challenging the overruling of his motion for judgment of acquittal at the close of all of the evidence, which occurred before the jury was instructed. Thus, we will evaluate Defendant's first point on the basis of whether there was sufficient evidence to submit the first-degree robbery and armed criminal action cases against Defendant to the jury without regard for the effect of instructions 11 and 12.

Id.

The Court of Appeals found that the evidence was sufficient to show that the defendant acted as an accomplice in committing the robbery because he drove the get-away vehicle and fled from the police. *Id.* The Court next reviewed the defendant's claim of an instructional error under the plain error review, and found no plain error. *Id.*

In *State v. Lane*, 415 S.W.3d 740, 751-752 (Mo. App. S.D. 2013), the defendant claimed that the evidence was insufficient to find him guilty of statutory sodomy for digitally penetrating the victim's vagina "as required in the verdict director." The Court of Appeals, Southern District, stated that the defendant's claim of sufficiency arose before the case was put to the jury, and that it was "really an issue of whether the case should have been submitted to the jury" regardless of the verdict subsequently rendered. *Id.* at 752. The Court of Appeals reviewed the evidence in light of the statute defining statutory sodomy and found that the evidence supported the defendant's conviction without addressing the manner in which the jury was instructed. *Id.* at 753.

In *State v. Cates*, 3 S.W.3d 369 (Mo. App. S.D. 1999), the Court of Appeals distinguished between a finding of insufficient evidence and that of improper jury instruction. The defendant in *Cates* was charged as an accomplice for acting with two other people with attempting to manufacture methamphetamine. *Id.* at 370. The verdict director improperly instructed the jury to find that the defendant's accomplices acted recklessly instead of knowingly as to their knowledge of a controlled substance. *Id.* at 371. After analyzing a claim of instructional error, the court took up the defendant's claim that the evidence was insufficient to find that the accomplices acted recklessly, i.e., that the evidence was insufficient to support the allegations in

the improper instruction. Id. at 372. The Court found that there was sufficient evidence that would establish the mental state necessary for the crime -- that the accomplices acted knowingly -- and noted that, "but for the instructional error, neither side would apparently question the sufficiency of the evidence to support the jury's verdict." *Id*. at 373. Finding that the evidence was sufficient to support the required element instead of the element actually included in the instruction, the Court refused to reverse, stating:

> In reality, Defendant's claim that there was insufficient evidence adduced at trial to establish recklessness is not an evidentiary claim but rather a circular attack on the verdict director. As such, it is simply a reiteration of Defendant's claim of plain error with regard to Instruction No. 5. Therefore, as mentioned in Defendant's first point, although the verdict-directing instruction erroneously misstated the requisite mental state, no manifest injustice resulted as the mental state of Guess and Robertson was never in dispute at trial. Consequently, Defendant's second point must also be denied.

Id.

In *State v. Thompson*, 112 S.W.3d 57 (Mo. App. W.D. 2003), the Court reviewed a claim of reversible error in submitting a jury instruction on

accomplice liability. The Court found that the jury instruction was erroneous because it instructed the jury in the disjunctive on the theory that the defendant acted together with or encouraged another person in committing the crime, but there was no evidence to support one of the alternatives. *Id.* at 70-71. The Court remanded the case for a new trial based on an instructional error and it did not discharge the defendant.

In *State v. Bullock*, 179 S.W.3d 413, 415-416 (Mo. App. S.D. 2005), the defendant claimed that the evidence was insufficient to show that he inserted his tongue in the victim's genitals as provided in the jury instructions. The Court of Appeals looked at the statutory definition of deviate sexual intercourse and found that the mere licking of the victim's genitals constituted statutory sodomy. *Id.* The Court stated that the language requiring the jury to find that the defendant inserted his tongue in the victim's genitals was mere surplusage that amounted to an unnecessary burden assumption by the state. *Id.* The Court determined that the evidence was sufficient to support the defendant's conviction on the basis that he licked the victim's genitals and affirmed the defendant's conviction despite the absence of evidence that the defendant inserted his tongue in the victim's genitals. *Id.*

In a related context, in *State v. Johnson*, 316 S.W.3d 491 (Mo. App. W.D. 2010), the Court reiterated the general principle that the question of the sufficiency of the evidence arises before the case is submitted to the jury. The defendant in *Johnson* claimed that the evidence was insufficient to show deliberation because the state argued that there was deliberation based on the defendant's failure to seek medical help after the conduct that caused the victim's death. *Id.* at 498. The Court disagreed. The Court stated that "the relevant question is what evidence could the jury have credited and what reasonable inferences could the jury have drawn from that evidence," not what the prosecutor argued to the jury *Id*. The Court reiterated that the proper analysis on a challenge to the sufficiency of the evidence was whether the case should have been submitted to the jury in the first place, and concluded that the evidence was sufficient to submit the case to the jury regardless of the prosecutor's comments in closing argument. *Id.*

Because the evidence was sufficient to support appellant's conviction on the basis that he acted as a principal, the question to be determined was whether the trial court plainly erred in submitting a jury instruction that included accomplice liability language, not whether the evidence was sufficient to support a conviction on the theory of accomplice liability. As discussed above, the evidence was sufficient to support appellant's conviction

for trafficking in the second degree. The trial court did not abuse its discretion in denying appellant's motion for judgment of acquittal.

Appellant relies on *State v. Miller*, 372 S.W.3d 455 (Mo. banc 2012), to argue that this Court has reviewed the sufficiency of the evidence in conformity with the jury instructions (App. Br. 25-26). However, while the Court discussed how the jury was instructed, the instruction was not essential in *Miller*; rather, what was important in *Miller* was the crime that was charged in the information. *Id.* at 464-465. The information in *Miller* alleged that the defendant committed two counts of statutory sodomy based on the defendant inserting his finger in the victim's genitals between December 3, 2004, and December 3, 2005, and the jury was instructed accordingly. *Id.* at 463-464. However, the evidence presented at trial showed that the only acts of the defendant inserting his fingers in the victim's genitals occurred six years earlier, between 1998 and 1999. *Id.* This Court held that while the exact date of committing the offense was not an element of the crime, the charging document had to allege the time with a reasonable particularity to put the defendant on notice of the offense for which he was tried and protect him against double jeopardy. *Id.* at 466. The Court found that the six-year difference between the time alleged in the information and the proof presented at trial was too great to allow the conviction to stand and that the state had therefore failed to prove the offense that was charged in

the information. *Id.* at 467. The fact that the offense charged was also in the instruction was incidental to the holding.

Unlike the defendant in *Miller*, appellant was on notice that he committed the crime "acting either alone or knowingly in concert with another person or persons" (L.F. 5-6). Thus, his ability to defend against the charges was not affected. As discussed above, the proof at trial established the statutory elements of the crime as charged in the information. The trial court did not abuse its discretion in denying appellant's motion for judgment of acquittal. Appellant's claim should be denied.

II.

The trial court did not plainly err in submitting instruction No. 6 which included accomplice liability language.

In his second point, appellant claims that the trial court plainly erred in submitting Instruction No. 6, which instructed the jury that appellant or Roberto Maldonado-Echeverria possessed the methamphetamine and that appellant acted together with or aided Maldonado-Echeverria in committing the offense (App. Br. 44-55).

Appellant acknowledges that he did not object to the instruction, and he requests plain error review (App. Br. 48). "Instructional error seldom rises to the level of plain error." *State v. Manuel*, 443 S.W.3d 669, 672 (Mo. App. W.D. 2014). "To show that the trial court plainly erred in submitting an instruction, the defendant 'must go beyond a demonstration of mere prejudice,' and must establish that the trial judge so misdirected or failed to instruct the jury as to cause manifest injustice or a miscarriage of justice." *Id*. "An appellate court is warranted in adopting a more practical view of the result of the instructional error." *Id*.

Appellant in the present case cannot show plain error from the submission Instruction No. 6. Instruction No. 6 provided as follows:

> A person is responsible for his own conduct and he is also responsible for the conduct of another person in committing an

offense if he acts with the other person with the common purpose of committing that offense or if, for the purpose of committing that offense, he aids or encourages the other person in committing it.

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about July 16, 2010, in the County of Saline, State of Missouri, the defendant or Roberto Maldonado-Echeverria possessed 90 grams or more of any material or mixture containing any quantity of methamphetamine, a controlled substance, and

Second, that defendant knew or was aware of the presence and nature of the controlled substance,

then you are instructed that the offense of trafficking in the second degree has occurred, and if you further find and believe from the evidence beyond a reasonable doubt:

Third, that with the purpose of promoting or furthering the commission of that trafficking in the second degree, the defendant acted together with or aided Roberto Maldonado-Echeverria in committing that offense,

then you will find the defendant guilty of trafficking in the second degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

As used in this instruction, the term "possessed" means either actual or constructive possession of the substance. A person has actual possession if he has the substance on his person or within easy reach and convenient control. A person who is not in actual possession has constructive possession if he has the power and intention at a given time to exercise dominion or control over the substance either directly or through another person or persons. Possession may also be sole or joint. If one person alone has possession of a substance, possession is sole. If two or more persons share possession of a substance, possession is joint.

(L.F. 22).

A person is criminally responsible for the conduct of another when "he aids or agrees to aid or attempts to aid such other person in planning, committing or attempting to commit the offense." Section 562.041.1(2); *State v. Purl*, 236 S.W.3d 680, 685 (Mo. App. S.D. 2007). "The central tenet of

accomplice liability is the notion that all who act together 'with a common intent and purpose' in committing a crime are equally guilty." *Id.*, quoting *State v. Biggs*, 170 S.W.3d 498, 504 (Mo. App. W.D. 2005). Instructions made in the disjunctive are often used in cases of accomplice liability. *Id.* The purpose of the disjunctive is to give the jury an opportunity to consider evidence that is unclear whether the defendant acted alone or with an accomplice, or if it is unclear as to which person committed which acts. *Id.* Disjunctive submissions of alternative means by which a single crime can be committed is proper only if the alternative submissions are each supported by the evidence. *Id.*

Appellant failed to establish plain error from the submission of Instruction 6. The evidence supported the alternative submission that Maldonado-Echeverria possessed the drugs and that he acted together with or aided Maldonado-Echeverria. Maldonado-Echeverria traveled with appellant with a common purpose from Kansas City, a known drug distribution center, on a well-known drug corridor (Tr. 184-185). Appellant and Maldonado-Echeverria exited after passing signs warning about a drug check point ahead (Tr. 153, 156). See, e.g., *State v. Mack*, 66 S.W.3d 706, 709 (Mo. banc 2002) (there was individualized reasonable suspicion to conduct an investigatory stop when a car abruptly exited a highway at an exit without services at night in an apparent attempt to avoid "ruse" drug checkpoint).

The navigation device was placed so that Maldonado-Echeverria could see it, and it was reasonable to infer that he helped in navigating the trip (Tr. 180). Maldonado-Echeverria avoided eye contact with Trooper McGinnis and exhibited nervousness (Tr. 164-165). "[V]isible nervousness is probative of [a] defendant's awareness of the controlled substance." *State v. Watson*, 290 S.W.3d 103, 109 (Mo. App. S.D. 2009).

There was strong odor of a masking agent that would have been apparent to Maldonado-Echeverria (Tr. 165-166). The methamphetamine was still wet and it was in great quantity, supporting an inference that an odor masking agent was needed to conceal its odor (Tr. 178). The trier of fact could have reasonably inferred that appellant and Maldonado-Echeverria used a masking agent to mask the smell of their recently produced methamphetamine. See *State v. Garza*, 853 S.W.2d 462, 464 (Mo. App. S.D. 1993) (the presence of odor masking agent combined with the fact that the defendant was traveling on a drug trafficking corridor gave the police probable cause to search the vehicle for drugs).

Maldonado-Echeverria provided a conflicting account with appellant's statement regarding the destination and the purpose of their trip (Tr. 167-168, 173). Appellant claimed that they were going to Marshall to pick up a truck from an unidentified person, while Maldonado-Echeverria claimed that they were going to Sedalia to visit appellant's friend (Tr. 167-168, 173).

Maldonado-Echeverria and appellant also gave conflicting statements regarding the length of their relationship (Tr. 168, 175). The lip of the truck bed liner was extending outside the bed of the pickup which should have been obvious to someone traveling a long distance in the truck (Tr. 177, 201, State's Exhibit 4). "Consciousness of guilt can be inferred from false statements made in an attempt to deceive the police." *State v. Chong-Aguirre*, 413 S.W.3d 378, 387 (Mo. App. S.D. 2013). "The factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt." *State v. Mitchell*, 442 S.W.3d 923, 931 (Mo. App. S.D. 2014).

Trooper McGinnis found 438.74 grams of methamphetamine (Tr.178-179, 237, 295). The methamphetamine was worth approximately $43,000 (Tr. 188). Maldonado-Echeverria became extremely angry when Trooper McGinnis found the drugs (Tr. 179-180). The presence of a large quantity of illegal substance in the truck was an incriminating factor supporting an inference of guilt. *State v. Gonzalez*, 235 S.W.3d 20, 26 (Mo. App. S.D. 2007).

Viewed under the totality of the circumstances, the evidence connected Maldonado-Echeverria to the drugs and supported giving an instruction in the disjunctive. *See State v. Powell*, 973 S.W.2d 556, 560 (Mo. App. W.D. 1998) (the defendant had constructive possession of a controlled substance even though he was a passenger and did not own the car in which the marijuana was found, where the defendant and two others had been in

possession of the car throughout the day before the arrest, the controlled substance was under the passenger seat, the defendant acted nervously, the odor of marijuana emanated from the car, and he appeared to be under the influence); *State v. Farris*, 125 S.W.3d 382, 387 (Mo. App. W.D. 2004)(the evidence connected the defendant, a passenger in the car, to methamphetamine-manufacturing items found in the trunk and on the roadway where it was reasonable to infer that freshly-made methamphetamine on the roadway was thrown through the car window, there was a strong odor associated with methamphetamine production, and the defendant made false statements showing consciousness of guilt). This evidence showed that appellant acted together with or aided Roberto Maldonado-Echeverria in committing that offense.

Appellant argues that there was no evidence that Maldonado-Echeverria possessed the methamphetamine as provided for in the first paragraph of the instruction (App. Br. 49-50). Appellant contends that the Court of Appeals reversed Maldonado-Echeverria's conviction for drug trafficking stemming from the same incident (App. Br. 49-50). But the Court of Appeals' decision in *State v. Maldonado-Echeverria*, 398 S.W.3d 61 (Mo. App. W.D. 2013), is not controlling in this case. These two defendants were not tried together, and the sufficiency of the evidence should be determined based on the evidence presented in this case. Even in cases where co-

defendants are jointly tried, acquitting one of the defendants is not inconsistent with the guilty verdict against the co-defendant. For example, in *State v. McGee*, 284 S.W.3d 690, 708-709 (Mo. App. E.D. 2009), the Court of Appeals denied the defendant's claim that the trial court erred in accepting the jury's verdicts finding him guilty of robbery, kidnapping, impersonation of a police officer, and attempted stealing because the jury found the co-defendant not guilty on these crimes. The Court reasoned that the charges against the defendant were not dependent on the charges against co-defendant and the jury could find that defendant, acting with the co-defendant, committed all the conduct elements of the charged offenses but that the co-defendant, while present, lacked the requisite mens rea. *Id.* Similarly, in the present case, the fact-finder could determine that Maldonado-Echeverria committed acts associated with transporting the drugs, but that he lacked the prerequisite mental state for committing the crime. The Court of Appeals' decision in *State v. Maldonado-Echeverria*, 398 S.W.3d 61 (Mo. App. W.D. 2013), is not binding on the analysis of the jury instruction submitted in the present case.

Additionally, the issue in the present case is whether there was manifest injustice from the submission of Instruction No. 6 on drug trafficking in the second degree. Thus, appellant has to show that the trial judge so misdirected or failed to instruct the jury by giving Instruction No. 6

as to cause manifest injustice or a miscarriage of justice. In *State v. Maldonado-Echeverria*, the Court of Appeals reviewed the evidence presented in Maldonado-Echeverria's trial and decided that it was insufficient to support his conviction under the facts in that case. The Court's holding in *State v. Maldonado-Echeverria*, 398 S.W.3d. 61, was based on the particular facts presented in that case. Thus, appellant's reliance on that opinion is misplaced.

The cases cited by appellant are distinguishable because they involved a situation where the co-defendant or co-defendants committed all conduct elements of the crime and the defendant's liability was based on aiding the person who committed the crime (App. Br. 52-54). For example, in *State v. Thompson*, 112 S.W.3d 57, 60 (Mo. App. W.D. 2003), the defendant was aware that other gang members were going to assault the victim, but he was not present during the assault and he did not participate in it. *Id.* at 60. After the assault, the defendant helped the co-defendants by transporting the victim in the defendant's car. *Id.* The Court of Appeals found that MAI-CR 3d

304.04 note on use 5(a) should have been followed to ascribe all conduct elements to the co-defendants rather than the defendant.[2]

Unlike in the cases cited by appellant, the facts in the present case fall within the factual situation addressed in MAI-CR3d 304.04 note on use 5(c), which instructs that where the evidence is unclear as to which person engaged in the conduct elements of the offense, the instruction should ascribe the conduct elements to the defendant or the co-defendant, and it should include language such as "acted together with or aided." Where, as here, the evidence is unclear who committed each act constituting an element of the crime, submitting the jury instruction in the disjunctive is proper. See *State v. Brown,* 246 S.W.3d 519, 529 (Mo. App. W.D. 2008) (the jury instruction that attributed the conduct element of shooting the victim to the defendant "or" the other perpetrator and instructed that the defendant "acted together with" the other perpetrator was appropriate where the evidence was unclear who committed conduct elements of the offense of murder). Appellant cannot show manifest injustice from the submission of Instruction No. 6.

Appellant's claim should be denied.

---

[2] The other two cases cited by appellant, *State v. Scott*, 689 S.W.2d 758 (Mo. App. E.D. 1985), and *State v. Wilhelm*, 774 S.W.2d 512 (Mo. App. W.D. 1989), were decided before the enactment of the current MAI-CR 3d 304.04.

CONCLUSION

For the foregoing reasons, appellant's convictions and sentences should be affirmed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Dora A. Fichter
DORA A. FICHTER
Assistant Attorney General
Missouri Bar No. 51756

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
Dora.Fichter@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.0, and contains 6,976 words as determined by Microsoft Word 2010 software; and

2. That a copy of this notification was sent through the eFiling system on November 23, 2015, to:

Margaret Johnston
1000 West Nifong
Bldg. 7, Ste. 100
Columbia, MO 65203

/s/ *Dora A. Fichter*
DORA A. FICHTER
Assistant Attorney General
Missouri Bar No. 51756

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
Dora.Fichter@ago.mo.gov

ATTORNEYS FOR RESPONDENT